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In The Supreme Court of the United States

October Term, 1978

No. 78-1210

ERNST O. MOENCKMEIER and
JEANENE MOENCKMEIER,

Petitioners

v.

UNITED STATES OF AMERICA and
J. RICHARD HOOKS, Special Agent,
Internal Revenue Service

and

LANDMARK BANK OF ORLANDO,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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January 30, 1979

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners ERNST O. MOENCKMEIER and JEANENE MOENCKMEIER, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered November 13, 1978, which affirms the March 22, 1978 order of the United States District Court for the Middle District of Florida, Orlando Division.

OPINIONS BELOW

Fifth Circuit. There was no formal opinion rendered by the U.S. Court of Appeals for the Fifth Circuit. The Judgment of November 13, 1978 affirming the order of the district court is set forth in the appendix. Also set forth in the appendix are the denial of the petition for rehearing filed December 7, 1978 and the recall and stay of the mandate until February 1, 1979 pending petition for a writ of certiorari in the Supreme Court, filed December 28, 1978.

District Court. There was no formal opinion in the district court below. The order with Findings of Facts and Conclusions of Law rendered on March 22, 1978 and the order denying the motion to vacate or to alter and amend, filed April 5, 1978 are set forth in the appendix.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on November 13, 1978. A timely petition for rehearing was denied on December 7, 1978. The judgment and denial of rehearing are set forth in the appendix. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. AN INTERVENOR UNDER 26 U.S.C. §7609 WHO RAISES A CLAIM OF UNLAWFUL ELECTRONIC SURVEILLANCE UNDER 18 U.S.C. §3504 IN A PROCEEDING TO JUDICIALLY ENFORCE AN I.R.S. ADMINISTRATIVE SUMMONS ISSUED AND SERVED UPON A THIRD-PARTY RECORDKEEPER UNDER 26 U.S.C.§7604 HAS SHOWN CAUSE IN THE RETURN HEARING BY MAKING THE 18 U.S.C.§3504 CLAIM. DUE PROCESS GUARANTEES OF THE FIFTH AMENDMENT REQUIRE THAT THE GOVERNMENT PRODUCE ALL AFFIANTS WHO FILED RESPONSIVE AFFIDAVITS UNDER 18 U.S.C.§3504 SO THAT SAID AFFIANTS ARE AVAILABLE FOR CROSS-EXAMINATION ON THEIR AFFIDAVITS IN AN ADVERSARY HEARING SEPARATE FROM THE SHOW CAUSE HEARING.

II. THE UNITED STATES COURTS OF APPEALS ARE SPLIT ON THE DEGREE AND NATURE OF A SUFFICIENT RESPONSE TO A SUBSTANTIAL CLAIM OF ILLEGAL ELECTRONIC SURVEILLANCE UNDER TITLE 18, UNITED STATES CODE, SECTION 3504(a)(1).

III. IN ORDER TO EFFECTUATE THE INTENT OF CONGRESS AND THE DEPARTMENT OF JUSTICE IN ENACTING TITLE 18, UNITED STATES CODE, SECTION 3504(a)(1), THE COURT MUST REQUIRE THE GOVERNMENT TO MEET ITS BURDEN UNDER 18 U.S.C.§3504(a)(1) TO "AFFIRM OR DENY" UNLAWFUL ELECTRONIC SURVEILLANCE WITH A MEANINGFUL AND UNEQUIVOCAL RESPONSE AFTER MAKING A THOROUGH SEARCH OF ITS FILES, WHEN A SUBSTANTIAL CLAIM OF UNLAWFUL ELECTRONIC SURVEILLANCE IS MADE.

PRIMARY CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

Constitution of the United States, Amendment V:

"No person shall . . . . nor shall be deprived of life, liberty, or property, without due process of law; . . . ."

Title 18, United States Code, Section 3504:

Litigation concerning sources of evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States--

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

STATEMENT OF THE CASE

On November 7, 1977, respondent, J. Richard Hooks, a special agent of the Internal Revenue Service, Intelligence Division, issued and served upon respondent Landmark Bank of Orlando, a third-party recordkeeper under Title 26, United States Code, Section 7609(a)(3)(A) in Orlando, Florida, two I.R.S. summonses. The summonses requested bank records relating to petitioners Ernst O. Moenckmeier and Jeanene Moenckmeier. December 1, 1977 was the specified return date in the summonses. Special Agent Hooks was then assisting the I.R.S. District Intelligence Division in Newark, New Jersey in their investigation of petitioners, intervenors below.

Pursuant to 26 USC §7609, the targets of the investigation, Ernst O. Moenckmeier and Jeanene Moenckmeier, instructed the respondent bank to refuse to comply with

the administrative summonses. The bank complied with the instructions of petitioners, intervenors below, and refused to turn over the records relating to the accounts of petitioners.

The United States filed a civil action in the United States District Court for the Middle District of Florida, Orlando Division to enforce the summonses. Petitioners, intervenors below, filed a claim under Title 18, United States Code, Section 3504 (a)(1) for assurances that their phones were not tapped or a statement that they were. Under 18 USC §3504 when a claim of unlawful electronic surveillance is made at a hearing, the government is required to "affirm or deny" the unlawful electronic surveillance. The respondents, the United States, filed three affidavits (A-9-11) on the day of the show cause hearing in response to petitioners 18 USC §3504 claim, stating they had "no knowledge" of any wiretapping. All three affidavits were executed by government officers who were not present at the show cause hearing on March 21, 1978, and therefore not available for cross-examination. The two I.R.S. special agents who testified at the hearing, stated that they knew of no electronic surveillance; however they also stated that they were not familiar with the investigation in Newark, except that the Orlando office had been requested by Newark to issue the administrative summonses in Orlando.

The short "to my knowledge" affidavits submitted by the government did not set forth any facts showing the methods used nor the records searched in determining that there was no electronic surveillance. In fact, it was apparent from the affidavits that no files were searched nor any officers

canvassed. The affidavits were conclusory and ambiguous. Judge John A. Reed found that the 18 USC §3504 claim of petitioners, intervenors below, was substantial but also found the government's response to be adequate. The district court ordered the enforcement of the I.R.S. summonses (A-6), but stayed the enforcement of the summonses pending the outcome of the appeal.

On March 24, 1978, petitioners made a Motion to Vacate or to Alter and Amend, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Petitioners requested that the enforcement order be stayed until petitioners could cross-examine the affiants who were not produced at the March 21, 1978. Petitioners, intervenors below, submitted affidavits of additional telephone irregularities, including those of their counsel, in support of their Motion to Vacate or Alter and Amend. Judge Reed denied the motion on April 5, 1978 (A-5).

A timely notice of appeal was filed on April 10, 1978. The U.S. Court of Appeals for the Fifth Circuit heard the oral argument on the appeal on November 8, 1978. On November 13, 1978 the Fifth Circuit affirmed the decision of the district court "on the basis of the Findings of Fact and Conclusions of Law of District Judge John A. Reed, Jr. dated March 22, 1978". (A-4)

Petitioners filed a timely petition for rehearing in the Fifth Circuit and this petition was denied on December 7, 1978. The mandate to the U.S. District Court for the Middle District of Florida, Orlando Division was issued on December 14, 1978 (A-2) Upon the motion of petitioners' counsel

the mandate was recalled on December 28, 1978 and stayed until February 1, 1979 (A- 1) pending the filing of a petition for a writ of certiorari with the Supreme Court by February 1, 1979.

Petitioners have been the target of several criminal investigations in the past which lends support to petitioners' claim that their phones have been wiretapped. Petitioners are under investigation by the federal grand jury in Brooklyn, N.Y. for alleged customs' violations. In 1976 petitioners were indicted by a federal grand jury in Newark, New Jersey for criminal contempt for allegedly violating an injunction against the sale of amygdalin ("laetrile").

Petitioners, their friends and their counsel had been experiencing telephone irregularities during the year prior to the show cause hearing on March 21, 1978 and also are experience telephone irregularities up to and including today's date. Affidavits dexribing those irregularities were submitted to the district court in support of petitioners' 18 USC 3504(a)(1) claim and their Motion to Vacate or Alter and Amend.

REASONS FOR GRANTING THE WRIT

I. AN INTERVENOR UNDER 26 U.S.C.§7609 WHO RAISES A CLAIM OF UNLAWFUL ELECTRONIC SURVEILLANCE UNDER 18 U.S.C.§3504 IN A PROCEEDING TO JUDICIALLY ENFORCE AN I.R.S ADMINISTRATIVE SUMMONS ISSUED AND SERVED UPON A THIRD-PARTY RECORDKEEPER UNDER 26 U.S.C.§7604 HAS SHOWN CAUSE IN THE RETURN HEARING BY MAKING THE 18 U.S.C.§3504 CLAIM. DUE PROCESS GUARANTEES OF THE FIFTH AMENDMENT REQUIRE THAT THE GOVERNMENT PRODUCE ALL AFFIANTS WHO FILED RESPONSIVE AFFIDAVITS UNDER 18 U.S.C.§3504 SO THAT SAID AFFIANTS ARE AVAILABLE FOR CROSS-EXAMINATION ON THEIR AFFIDAVITS IN AN ADVERSARY HEARING SEPARATE FROM THE SHOW CAUSE HEARING.

The district court hearing of March 21, 1978 was cheduled for the sole purpose of providing petitioners/intervenors, Ernst O. Moenckmeier and Jeanene Moenckmeier, claimants under 18 USC §3504, with the opportunity to show cause why the I.R.S. third-party recordkeeper administrative summonses should not be enforced. Petitioners/intervenors showed cause at that hearing by making a substantial 18 USC §3504 claim of unlawful electronic surveillance. At that time that was all that was required of petitioners/intervenors. This claim triggered the government's obligation under 18 USC §3504 to either "affirm or deny" unlawful electronic surveillance.

The responsive affidavits filed by the government at the show cause hearing of March 21, 1978 (A- 9-11)were ambiguous and did not reflect a scrupulous canvass of agency records, as required under the test in In re Quinn, 525 F.2d 222 (1st Cir. 1975) and failed to meet the test for factual

sufficiency in U.S. v. Alter, 482 F.2d 1016 (9th Cir. 1973).

Petitioners/intervenors were denied due process guaranteed by the Fifth Amendment to the Constitution of the United States when they were not given notice nor the opportunity to prepare for cross-examination of government witnesses who appeared without notice and testified at the Show Cause hearing of March 21, 1978, but were not the affiants in the government's responsive affidavits. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1956). A fair hearing requires notice and opportunity to be heard. In order to effectively cross-examine a witness it is necessary to puruse first a statement of the witnesses. This is particularly true when, as under the Alter test, details of the canvass of the agency records plus details relating to the background of affiants is proper subject made for cross-examination.

The ambiguous "to my knowledge" affidavits submitted by the government in response to petitioners/intervenors §3504 claim, were not subject to cross-examination at the Show Cause hearing because the government did not make the affiants available. The affiants remained in New Jersey and New York during the hearing on March 21, 1978. Because the government submitted only ambiguous, conclusory affidavits in response to the §3504 claim, cross-examination of the affiants is necessary in order

to give the government's denial any meaning at all.

Petitioners, as intervenors, have not had an adversary hearing where they were given notice and opportunity to cross-examine government officers knowledgeable about the investigations of intervenors. A hearing with a right to cross-examine government officers knowledgeable about the investigation of an 18 USC §3504 proponent was allowed by the U.S. District Court for the Northern District of Texas and discussed by the U.S. Court of Appeals for the Fifth Circuit in In re Tierney, 465 F.2d 806, 812-813 (5th Cir. 1975). The Fifth Circuit has stated that "the comprehensive procedure followed in Tierney is preferable when circumstances permit", Beverly v. U.S., 468 F.2d 732, 744 (5th Cir. 1972). In Tierney the Court said it was preferable to require cross-examination of a Justice Department officer who conducted a Quinn-type canvass of the Secret Service, Customs Service, Internal Revenue Service, Alcohol, Tobacco and Firearms Division, Bureau of Narcotics and Dangerous Drugs, the Federal Bureau of Investigation, and presumably the Department of Justice.

Petitioners argue that each agency should canvass its own investigation records on a §3504 proponent and the one who conducts the canvass should be knowledgeable of that investigation and submit an affidavit that meets the Quinn standards. It is this affiant, petitioners insist, who should be made available for cross-examination after petitioners, as intervenors, have sufficient time to prepare for cross-examination of each of those affiants.

Petitioners submit the following test as an alternative to the Quinn canvass and cross-examination testimony of each agency officer involved in an investigation of a §3504 proponent:

> If an affidavit is submitted in response to a §3504 claim, the affiant must be available for cross-examination; however, it is not necessary that each agency or office conduct a separate Quinn-type canvass that produces a responsive affidavit. Nor is it necessary for the government to produce for cross-examination officers who have knowledge of the investigation but have not submitted an affidavit. The requirement is simply that 1) a person with the proper background who is knowledgeable about the investigation of the §3504 proponent conduct a Quinn-type canvass and 2) submit an affidavit and 3) be available for cross-examination. This could be a Justice Department officer with coordinating responsibilities or an officer of the various agencies involved.

In the case at bar, general, conclusory, inadequate, incomplete token affidavits (A-9-11) were submitted in response to a §3504 claim by affiants who were not available for cross-examination, even on their vague, generalized and meaningless sworn statements. As Alter, supra, points out, an affidavit so general that it allows an affiant to escape a perjury charge is an inadequate affidavit. Id. at 1026-1027. If courts require affidavits, it is a truism to say that these affidavits should say something.

In Bufalino v. Immigration and Naturalization Service, 473 F.2d 728 (3rd Cir. 1973), which was neither a criminal trial nor a grand jury proceeding, the administrative agency involved allowed the cross-examination of government officers at an adversary hearing. The U.S. Court of Appeals for the Second Circuit, U.S. v. Toscanino, 500 F.2d 267,281(2d.1974)remanded the case to the district court for an evidentiary hearing. In a case decided before 18 USC §3504 became law, the Supreme Court in Alderman v. U.S., 394 U.S. 165 at 187 (1969), remanded the case to the district court for an evidentiary hearing on the question of unlawful electronic surveillance. In In re Vigil, 524 F.2d 209,216 (10th Cir.1975) the U.S. Court of Appeals for the 10th Circuit expressed its preference for an adversary proceeding: "In our view, testimoney in court carries more weight than conclusory statements in affidavits for the manifest reason that it can be subjected to cross-examination." The U.S. Court of Appeals for the Fifth Circuit stated in U.S. v. Beverly, supra at 744 that "the comprehensive procedure followed in Tierney is preferable when circumstances permit," referring to the adversary hearing in Tierney, supra.

Petitioners, as intervenors, have made allegations of unlawful electronic surveillance which are substantial. There is no way to find out whether or not the government's denial, if there be one, is true, and there is no way to determine whether or not the electronic surveillance is legal unless this Court orders (1) specific verified denials by knowledgeable government officers, and (2) an evidentiary hearing with the opportunity to cross-examine those officers.

Here, petitioners, as intervenors, in their motion to amend the district court's order (A-6) asked for the opportunity to cross-examine the actual affiants who checked their respective agency records regarding the wiretapping of petitioners' phones as well as those of their counsel, but said motion was denied (A-5). The officers who checked the records were unavailable for cross-examination. Two I.R.S. special agents testified but they said they knew nothing of the Newark, N.J. investigation which petitioners, as intervenors, say involved unlawful electronic surveillance.

Petitioners/intervenors were denied the notice and opportunity to prepare for cross-examination and were denied a hearing to cross-examine the affiants, which is a denial of due process guaranteed by the Fifth Amendment to the Constitution of the United States. Petitioners request that they now be given the notice and opportunity to be heard on their 18 USC §3504 claim at an adversary hearing.

II. THE UNITED STATES COURTS OF APPEAL ARE SPLIT ON THE DEGREE AND NATURE OF A SUFFICIENT RESPONSE TO A SUBSTANTIAL CLAIM OF ILLEGAL ELECTRONIC SURVEILLANCE UNDER TITLE 18, UNITED STATES CODE, SECTION 3504(a)(1).

The responses to an 18 USC §3504(a)(1) claim which have been held to be sufficient by the U.S. Courts of Appeals range from a general denial in response to an unsubstantiated claim, U.S. v. See, 505 F.2d 845, 856 (9th Cir. 1974), U.S. v. Stevens, 510

F.2d 1101, 1105-1106 (5th Cir. 1975) to affidavits which reflect a canvass of agencies by person(s) in a position to know about the existence of electronic surveillance, In re Quinn, supra, U.S. v. Alter, supra, U.S. v. Weiner, 418 F.Supp 941 (M.D.Pa. 1976), In re Tierney, supra, to affidavits reflecting canvasses with the opportunity to cross-examine the affiants, In re Tierney, supra, U.S. v. Weiner, supra.

The U.S. Courts of Appeals in several Circuits have frowned upon ambiguous "to my knowledge" affidavits by persons not in a position to have complete knowledge regarding the existence of electronic surveillance, U.S. v. Alter, supra at 1027, In re Quinn, supra at 225 n.5, U.S. v. Rubin, 559 F.2d 975, 989 (5th Cir. 1977) and have required that denials "should be given in absolute terms and by an authoritative officer of the Department, one who speaks with knowledge of the facts and circumstances. This is no place for ambivalent statements or loopholes." In re Vigil, supra at 216. See also U.S. v. Alter, supra at 1027.

In many Circuits, a mere assertion of unlawful electronic surveillance triggers 18 USC §3504(a)(1), In re Evans, 452 F.2d 1239, 1247 (D.C.Cir. 1971); however, in the Second Circuit the claim must be at least "colorable" before it will trigger a §3504(a)(1) denial. In re Millow, 529 F.2d 770, 774 (2d Cir. 1976).

Although there is some agreement between the Circuits that the specificity of the response depends on the specificity of the claim, "the fluid test," especially with regard to general §3504(a)(1) claims,

U.S. v. See, supra at 856, U.S. v. Stevens, supra at 1105-1106, U.S. v. Yangita, 552 F.2d 940, 944 (2d Cir. 1977), there is a conflict between the Circuits as to the nature and degree of response required when a substantial §3504(a)(1) claim is made. Applying the "fluid test" mentioned above, a substantial claim should require a substantial response.

Petitioners/intervenors in the case herein made a substantial claim of illegal electronic surveillance under 18 USC §3504 (a)(1) and this fact is not in dispute. The district court below found that the Moenckmeiers (petitioners/intervenors) "have made a substantial claim of unlawful electronic surveillance pursuant to Title 18, United States Code, Section 3504" (emphasis added). See Findings of Fact No. 2 in the Order of March 22, 1978 (A-6). This finding was adopted by the United States Court of Appeals for the Fifth Circuit in its decision of November 13, 1978 (A-4). Rehearing denied, December 7, 1978 (A-3).

The district court below found that the government's general and ambiguous affidavits and the testimony of government agents who were not the affiants were an adequate response to petitioners/intervenors claim. The authority upon which the district court relied in determining the adequacy of the response was In re Millow, supra (A-8), which requires that "Once a substantial claim is made under the statute, those government agencies closest to the investigation must scrupulously search their files and submit affidavits affirming or denying the validity of the aggrieved party's claim and indicating which agencies have been checked." Id. at 774.

There was no scrupulous search of agency files in the case herein. Although the Court indicated in its Findings that it relied on In re Millow, supra, its Findings were contrary to the standard for a response to a substantial claim given in In re Millow, supra, at 774. Had the district court followed In re Millow it would have held that the response of the government was inadequate and that petitioners/intervenors were entitled to a substantial response in the form of additional affidavits reflecting a scrupulous search of agency files.

Although most of the decisions which have discussed the sufficiency of a government response to an 18 USC §3504(a)(1) claim have discussed the sufficiency of a response to an unsubstantiated and general claim, the following decisions have discussed substantial responses and petitioners/intervenors suggest that the Court look to these decisions as a basis to determine the proper government response to a substantial §3504(a)(1) claim in the case herein. U.S. v. Alter, supra, In re Quinn, supra, In re Millow, supra, In re Tierney, supra.

In U.S. v. Alter, supra at 1026-1027 the U.S. Court of Appeals for the Ninth Circuit held that in order for an 18 USC §3504 affidavit to be sufficient as a response, the affidavit:

1) must not be conclusory;

2) must supply information on the identity of other government employees canvassed;

3) must set forth "the substance of the inquiries, or the substance of the replies";

4) must contain "facts from which the court could conclude that . . . agencies he lists are the only governmental agencies that could have been involved in electronic surveillance."

5) must contain "the dates of claimed surveillance to which the inquiries were addressed";

6) must contain enough non-conclusory, specific facts so that it could be established that the affidavit was perjured.

In addition to the Alter test on adequacy of a governmental response to a §3504 claim, there is the Quinn test of the adequacy of the canvass to acquire the data necessary to make a meaningful §3504 response. In re Quinn, supra at 225. The government agencies involved in the investigation of the §3504 proponent must scrupulously search its files to have sufficient knowledge either to affirm or to deny the §3504 claim.

The U.S. Court of Appeals for the First Circuit described the governmental duty to search federal agency files as a "canvass". In re Quinn, supra. In Quinn, supra, the court required the government to produce affidavits denying illegal electronic surveillance and to include in those affidavits an explicit assurance that all agencies involved were canvassed as to whether there was any unlawful electronic surveillance of the §3504 proponent. Quinn, supra, summarizes the government's responsive requirements by holding that the governmental denial is based upon sufficient knowledge to be meaningful. In other words, even though Quinn does not require "perfect"

affidavits from the government in response to a §3504 claim, it does require an affidavit by a responsible officer in the position to know about the particular agencies' eavesdropping, wiretapping and bugging.

In In re Millow, supra, the U.S. Court of Appeals for the Second Circuit expressed the standard for the government's response when a substantial claim is made: "Once a substantial claim is made under the statute, those government agencies closest to the investigation, must scrupulously search their files and submit affidavits affirming or denying the validity of the aggrieved party's claim and indicating which agencies have been checked." Id. at 774.

The Fifth Circuit has not yet defined the adequacy of a government response when there is a substantial 18 USC §3504(a)(1) claim, a claim as in the instant case; but the Court has hinted at it in In re Tierney, supra.

> In Tierney we approved the procedure utilized by the district judge of requiring testimony under oath and subject to cross-examination from the Department of Justice attorney who made the responsive affidavit denying electronic surveillance on the party of the United States. That testimony included a statement that a check had been made with every government agency having any connection with the investigation, including, in addition to the F.B.I. and the Bureau of Narcotics and Dangerous Drugs, the Department of the Treasury,

which encompasses the Secret Service, Customs, the Internal Revenue Service, and the Alcohol, Tobacco and Firearms. Beverly v. U.S., supra at 744.

Although the Court in Beverly did not read Tierney to require the same comprehensive procedure used by the district court in Tierney, it did state that "the comprehensive procedure followed in Tierney is preferable when circumstances permit," Beverly v. U.S., supra at 744. The failure of the Court in subsequent cases to require the comprehensive procedure utilized in Tierney may be due to the fact that the Court did not determine the claims in subsequent cases to be substantial. Beverly v. U.S., supra, U.S. v. Stevens, supra, U.S. v. Tucker, 526 F.2d 279 (5th Cir. 1976), U.S. v. Rubin, supra.

The Court in U.S. v. Alter, supra at 1027 n.19 looked to In re Tierney, supra, as a possible "procedure by which Alter will be given the meaningful opportunity to which he is entitled to test its legal and factual sufficiency."

Petitioners contend that the procedure requested in their "Appellants' Brief" in the U.S. Court of Appeals for the Fifth Circuit would be a reasonable response to a substantial claim:

> 1. Either: a) to submit responsive affidavits under 18 USC 3504 from each agency involved in the investigation of appellants by an affiant who has knowledge of the investigation of intervenors and the use of electronic surveil-

> lance techniques and who has scrupulously canvassed officers and personnel in that agency on the possibility of the use of electronic surveillance in the investigation of appellants; or in the alternative; b) to submit responsive affidavits under 18 USC 3504 from an officer in the Department of Justice who has knowledge of the investigations of appellants and who is able to canvass each agency involved on the possibility of the use of electronic surveillance in the investigation of appellants; and
>
> 2. To produce said affiant or affiants, as the case may be, to be available fro cross-examination by appellants/ intervenors of the respective affidavit or affidavits; and
>
> 3. To produce officers of the Department of Justice, including, but not limited to, the Federal Bureau of Investigation and the Internal Revenue Service for a continued hearing on a 3504 claim expanded to cover electronic surveillance of appellants' counsel and electronic surveillance since March 21, 1978, the date of the district court I.R.S. summons enforcement hearing.

Petitioners also request that after the Court has defined a substantial response to a substantial 18 USC §3504(a)(1) claim, that it reverse the order of the district court enforcing the Internal Revenue Service administrative summonses compelling

the production of petitioners/intervenors' bank records (A-6); or in the alternative, grant a reversal and remand of the district court's order with instructions to order the government to produce a substantial response to petitioners/intervenors' 18 USC §3504(a)(1) claim, as defined by this Court, giving petitioners the opportunity to cross-examine affiants.

III. IN ORDER TO EFFECTUATE THE INTENT OF CONGRESS AND THE DEPARTMENT OF JUSTICE IN ENACTING TITLE 18, UNITED STATES CODE, SECTION 3504 (a)(1), THE COURT MUST REQUIRE THE GOVERNMENT TO MEET ITS BURDEN UNDER 18 USC §3504 (a)(1) TO "AFFIRM OR DENY" UNLAWFUL ELECTRONIC SURVEILLANCE WITH A MEANINGFUL AND UNEQUIVOCAL RESPONSE AFTER MAKING A THOROUGH SEARCH OF ITS FILES, WHEN A SUBSTANTIAL CLAIM OF UNLAWFUL ELECTRONIC SURVEILLANCE IS MADE.

In citing the Senate Report on 18 USC §3504, this Court in Gelbard V. U.S., 408 US 41 (1972) pointed out that 18 USC §3504 (a)(1) was added to sections 3504 (a)(2) and (a)(3) at the suggestion of the Department of Justice to codify the then current policy of the Department of Justice of searching Government files for information about wiretaps and eavesdropping even in cases where no motion had been filed.

> Subsection (a)(1) was added at the suggestion of the Department of Justice. At that time the Department followed a practice of searching Government files for information about wiretaps and eavesdropping.

> The Department advised the Senate Judiciary Committee that while it had been "conduct(ing) such examinations as a matter of policy even in cases where no motion ha(d) been filed... defendants should be assured such an examination by a specific requirement of law rather than hav(ing) to rely upon the continued viability of a current policy." Id., at 553. The Senate report on §3504 explained that "since [subsection (a)(1)] requires a pending claim as a predicate to disclosure, it sets aside the present wasteful practice of the Department of Justice in searching files without a motion from a defendant." S.Rep.No. 91-617, p. 154 (1969) Gelbard, supra at 56.

Existing Department of Justice policy was codified in §3504 (a)(1) in order to insure victims of wiretapping of a continuing Department of Justice policy and at the same time to set aside the current wasteful practice of searching files without a motion from a defendant. The Department of Justice stated that "defendants should be assured such an examination by a specific requirement of law". S.Rep. No. 91-617, p. 154 (1969). Enacting §3504 (a)(1) in place of current Department of Justice policy was not done to reduce the significance of the practice nor to provide less protection by the statute than available by the Department of Justice policy. It was enacted to ensure more protection for victims of wiretapping by requiring the search be made pursuant to statute.

If § 3504 (a)(1) was intended by the Department of Justice and the Senate to be a codification of a current practice, then it follows that the government's denial in response to a §3504 (a)(1) claim should at least be as inclusive as the search which the government performed under its earlier practice.

The government searched its files before the enactment of §3504 (a)(1) and should be required to search its files now in response to all §3504 (a)(1) claims. This is not a hardship on the Department of Justice-- in fact, as a result of the enactment of §3504(a)(1) the Department of Justice has less of a workload now because it no longer searches its files for wiretapping and eavesdropping in the absence of a motion. It now has more time to make thorough searches than under its previous policy because it has fewer searches to make.

The Department of Justice should not be permitted to render §3504(a)(1) meaningless by its ambiguous general denials when this statute was enacted at its suggestion, so that "defendants should be assured such examination by a specific requirement of law." Ibid.

Also, Gelbard v. U.S., supra at 56 cites the Hearings before the Subcommittee No. 5 of the House Committee on the Judiciary on S.30 et al., 91st Cong., 2d Sess. 84, 104 (1970) to illustrate that §3504 (a)(1) was also supported by the House "on the ground that it would be beneficial to the victims of illegal interceptions."

Senator Mc Clellan, for example, who testified before the House Subcommittee, indicated that subsection (a)(1) "places upon the Government an affirmative duty to answer a claim that evidence is inadmissible because of unlawful investigative conduct." " The first requirement (of §3504), that the Government admit or deny the occurrence of the alleged invasion of the defendant's rights, actually places or codifies a burden upon the Government, rather than the defendant." Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on S.30 et al., 91st Cong., 2d Sess. 84,104 (1970) Gelbard, supra at 56.

The Hearings before the House Subcommittee indicate that §3504 (a)(1) codifies the burden of the government to "admit or deny the occurrence of the alleged invasion of the defendant's rights". Ibid.

In order to give 18 USC §3504 (a)(1) meaning this Court must insist that the Department of Justice meet its burden to "affirm or deny" unlawful electronic surveillance by just as effective a search of its files as it made before the enactment of §3504 (a)(1).

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted in order to resolve the conflict between the U.S. Courts of Appeals on the nature and the degree of response required to be made by the government following a substantial 18 USC § 3504 claim of unlawful electronic surveillance.

Also, the Supreme Court should grant this petition in the interest of according petitioners the due process which they were denied at their Show Cause hearing on March 21, 1978. When an 18 USC §3504 proponent makes a substantial claim the proponent should be allowed to cross-examine the officers who submit responsive affidavits, after notice and sufficient time to prepare for a hearing.

Granting petitioners a hearing on their 18 USC §3504 claim will not place a heavy burden on the government and will not prejudice their investigation. The records which the government is seeking will remain in the hands of the third-party recordkeeper and there is no danger of their being destroyed. Had the government responded adequately at the time that the 18 USC §3504 claim was made, there would have been no delay, no appeal and this petition for writ of certiorari would not have been necessary. The government should not be permitted to violate petitioners right to due process, especially since it was at their request that Congress enacted 18 USC §3504.

Respectfully submitted,

John Joseph Matonis
Counsel for the Petitioners
225 Broadway, Suite 1800
San Diego, Calif. 92101
Telephone: 213/967-7060

January 30, 1979

CERTIFICATE OF SERVICE

I certify that on the 30th day of January, 1979, I served by U.S. Mail, postage prepaid, three copies of the foregoing petition upon the Solicitor General, Department of Justice, Washington, D.C., 20530, three copies on Gilbert E. Andrews, Esq., Chief, Appellate Section, Tax Division, United States Department of Justice, Washington, D.C. 20530, counsel for respondent, and 3 copy of the foregoing petition to F. Hartselle Baker, Esq., Hillcrest Plaza, Suite 202, 1516 East Hillcrest, Orlando, Florida 32803, counsel for respondent Landmark Bank of Orlando.

John Joseph Matonis

APPENDIX

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

December 28, 1978

TO ALL COUNSEL AND THE DISTRICT CLERK:

No. 78-1838 - U.S.A. & J. RICHARD HOOKS, ETC. v. LANDMARK BANK OF ORLANDO, ET AL.

MANDATE RECALLED AND STAYED TO AND INCLUDING February 1, 1979
(SEE ORDER ENCLOSED)

Dear Counsel:

The court has this day granted the recall and stay of the mandate to the date shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (3ELR 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

By copy of this letter to the clerk of the District Court, we request that he return the opinion and judgment issued as mandate on December 14, 1978.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Brenda Hauck
Deputy Clerk

enc.
cc Mr. John Joseph Matonis
Mr. M. Carr Ferguson
Mr. F. Hartsell Baker
Mr. George L. Hastings, Jr.
Mr. Wesley R. Thies, Clerk

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 78-1838

D. C. Docket No. CA78-74-Orl-Civ-R

UNITED STATES OF AMERICA and J. RICHARD HOOKS,
Special Agent, Internal Revenue Service,
Petitioners-Appellees,

versus

LANDMARK BANK OF ORLANDO,
Respondent,
ERNST O. MOENCKMEIER and JEANENE MOENCKMEIER,
Intervenors-Appellants.

Appeal from the United States District Court for the
Middle District of Florida

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

November 13, 1978

Issued As Mandate: DEC 14 1978

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

December 7, 1978

TO ALL PARTIES LISTED BELOW:

NO. 78-1838 - U.S.A. & J. RICHARD HOOKS v.
LANDMARK BANK OF ORLANDO, ERNEST O.
MOENCKMEIER & JEANNE MOENCKMEIER

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Sara Hamrick
Deputy Clerk

cc: Mr. John Joseph Matonis
Messrs. Kendell W. Wherry
M. Carr Ferguson
Gilbert E. Andrews
Mr. F. Hartselle Baker
Ms. Ann Belanger Durney
Mr. George L. Hastings, Jr.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 78-1838

UNITED STATES OF AMERICA and
J. RICHARD HOOKS, Special Agent,
Internal Revenue Service,

Petitioners-Appellees,

versus

LANDMARK BANK OF ORLANDO,

Respondent,

ERNST O. MOENCKMEIER and
JEANENE MOENCKMEIER,

Intervenors-Appellants.

Appeal from the United States District Court for the
Middle District of Florida

(NOVEMBER 13, 1978)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM:

Affirmed on the basis of the Findings of Fact and Conclusions of Law of District Judge John A. Reed, Jr. dated March 22, 1978.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA
and J. RICHARD HOOKS,
Special Agent, Internal
Revenue Service,

Petitioners,

vs. No. 78-74-Orl-Civ-R

LANDMARK BANK OF ORLANDO,

Respondent.

ERNST O. MOENCKMEIER and
JEANENE MOENCKMEIER,

Intervenors.

FILED
ORLANDO, FLA.
APR 5 1978
WESLEY R. THIES
CLERK

O R D E R

This cause came on for consideration without oral argument on the following motion filed by Intervenors and thereon, it is

ORDERED:

Motion to Vacate or to Alter and Amend Order etc.

Filing Date: 24 March 1978.

Disposition: Denied. Neither the Motion to Vacate nor the affidavits filed in support thereof present the court with any additional evidence that the telephones of the Intervenors are in anywise interfered with by an agency of the federal government. The affidavits, therefore, present no new evidence requiring a reconsideration of the government's petition to enforce the Internal Revenue Service summons.

DONE AND ORDERED in Chambers at Orlando, Florida, this 5th day of April, 1978.

John A. Reed Jr.
Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA
and J. RICHARD HOOKS,
Special Agent, Internal
Revenue Service,

Petitioners,

vs. No. 78-74-Orl-Civ-R

LANDMARK BANK OF ORLANDO,

Respondent,

ERNST O. MOENCKMEIER and
JEANENE MOENCKMEIER,

Intervenors.

FILED
ORLANDO, FLA.
MAR 22 1978
WESLEY R. THIES
CLERK

ORDER

This cause having come on for hearing and all parties having adduced evidence and the questions presented having been fully argued to the court, the court makes the following findings and conclusions:

Findings of Fact

1. The court finds as a fact that the documents summoned from the Landmark Bank of Orlando are relevant to the investigation of the income tax liabilities of Ernst O. Moenckmeier and Jeanene Moenckmeier for the tax years 1974, 1975 and 1976.

2. The court further finds that the Moenckmeiers have made a substantial claim of unlawful electronic surveillance pursuant to Title 18, United States Code, Section 3504.

3. The court finds that the United States has made an adequate response in the form of affidavits submitted as Government Exhibits 1, 2 and 3, which affidavits specifically deny that any wiretaps were conducted by the Internal Revenue Service or by the Customs Service and this information was specifically supported by the testimony of J. Richard Hooks, Special Agent of the Internal Revenue Service, denying the use of any electronic surveillance. That Government Exhibits 1, 2 and 3 cover the relevant government agencies is shown by the testimony of the Intervenors as well as their Exhibits 4 and 5. The evidence reveals no agency of government except the Internal Revenue Service and the U.S. Customs Service to be investigating the Intervenors.

4. The court further finds that the government learned of the possible existence of the records at the Landmark Bank of Orlando through visual rather than electronic surveillance.

5. The court finds that the Internal Revenue Service does not have the documents for which the summonses were issued.

Conclusions of Law

1. The court concludes as a matter of law that the summonses issued to the Landmark Bank of Orlando were issued for a proper purpose and the required administrative steps were followed.

2. Jeanene Moenckmeier and Ernst O. Moenckmeier are entitled to intervene in these proceedings. 26 U.S.C.A. § 7609.

3. The summonses in dispute are hereby ordered enforced with compliance to be completed within twenty days from the entry of this order, unless a notice of appeal is filed herein within that time, in which event this order will be stayed during the pendency of the appeal. During that time the Respondent Bank shall preserve all records described in the summonses.

4. The court specifically reserves ruling on the allowance of costs to the Respondent Bank for the reproduction of the summoned records until after full compliance, at which time the Bank shall make application for the allowance of costs and the United States shall have ten days to respond thereto.

5. Precedent relied on by the court includes United States v. Greenleaf, CA5, 1977, 546 F.2d 123, 126 and In re Millow, CA2, 1975, 529 F.2d 770.

DONE AND ORDERED in Chambers at Orlando, Florida, this 22nd day of March, 1978.

John A. Reed
Judge

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RLF:jaa

STATE OF NEW JERSEY :
SS:
COUNTY OF ESSEX :

AFFIDAVIT

RICHARD L. FRIEDMAN, of full age, being duly sworn according to law upon his oath, deposes and says:

1. I am an Assistant United States Attorney for the District of New Jersey.

2. As part of my duties I investigated and handled civil and criminal litigation relating to activities of Ernest O. Moenckmeier, Jeanne Moenckmeier, Spectro Foods Corporation, etc. These matters, which relate to the manufacture and distribution of laetrile, were handled by the Food and Drug Administration (Newark, N.J.) under my supervision from on or about October 1976 to on or about March 1977. To the best of my knowledge during the above time and until today's date there has been no electronic surveillance or wire tapping in connection with these matters.

Richard L. Friedman
RICHARD L. FRIEDMAN
Assistant U.S. Attorney

Sworn and Subscribed
to before me this 16th
day of March, 1978.

Alexandria Reed
A NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 3/25/81.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA
AND J. RICHARD HOOKS
SPECIAL AGENT
INTERNAL REVENUE SERVICE

PETITIONERS,

VS.

No. 78-74-ORL-CIV-R

LANDMARK BANK OF ORLANDO

RESPONDENT

AFFIDAVIT

I, NELSON H. PATNAUDE, of full age, being duly sworn according to law hereby depose and say:

1. I am a Special Agent employed by the Internal Revenue Service, Intelligence Division, Newark, New Jersey and have been so employed since 1961.

2. Since my involvement with the Intelligence Division investigations relating to JEANENE MOENCKMEIER and ERNST MOENCKMEIER I have no knowledge of any wire taps having been used in these investigations.

By: NELSON H. PATNAUDE
Special Agent
Intelligence Division
Newark, District Director's Office
Internal Revenue Service

Sworn and subscribed to
before me on this day
of , 1978

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires: 7/79

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A-10

RECEIVED BY
U. S. ATTORNEY
MIDDLE DISTRICT OF FLORIDA

MAR 20 1978

ORLANDO

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

United States of America

Plaintiff

v.

Ernst and Jeanene Moenckmeier

Defendants.

Affidavit

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

JOHN L. RENNISH being duly sworn deposes and says that:

1). I am a special agent in the United States Customs Service, Department of the Treasury.

2) I am currently case agent assigned to investigate possible violations of Customs laws wherein Ernst and Jeanene Moenckmeier are the target of the investigation.

3) During the course of this investigation I have never used nor do I know of any other officer of the United States Customs Service using electronic eavesdropping techniques in obtaining evidence against Ernst and Jeanene Moenckmeier or any possible co-conspirator.

JOHN L. RENNISH

Sworn to before me this 17th
day of March, 1978.

HARVEY BARRISON
NOTARY PUBLIC, State of New York
No. 30-6172280
Qualified in Nassau County
Commission Expires March 30, 19 79

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